No. 78-1904

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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HOWARD MORLAND, ET AL., PETITIONERS

*v.*

THE HONORABLE ROBERT A. SPRECHER, ET AL.

---

*ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

## OPINIONS BELOW

The initial opinion of the district court (Pet. App. 1a) is reported at 467 F. Supp. 990. The court of appeals' order of May 16, 1979 (App. A, *infra*), denying petitioners' motion for expedited hearing, but setting argument for the week of September 10, 1979, is unreported, as is the June 5, 1979, order (App. B, *infra*) establishing a briefing schedule and setting oral argument for September 10, 1979. The district

court's public order (Pet. App. 12a), and its in camera memorandum and order (Pet. App. 13a) of June 15, 1979, have not been reported. The order of one judge of the court of appeals consolidating petitioners' appeals and granting in part petitioners' motion for an expedited briefing schedule (Pet. App. 20a) also is unreported.

## JURISDICTION

The order of one judge of the court of appeals granting in part petitioners' motion for an expedited briefing schedule (Pet. App. 20a) was entered on June 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1651.

## QUESTION PRESENTED

Whether mandamus should issue to order the court of appeals to alter the briefing and argument schedule one of its judges established for petitioners' consolidated appeals.

## STATEMENT

On March 26, 1979, the United States District Court for the Western District of Wisconsin entered a preliminary injunction restraining petitioners Morland, Day, and Knoll (as well as The Progressive, Inc., which has not joined in this request for mandamus) from publishing or otherwise disseminating an article entitled "The H-Bomb Secret: How We Got It, Why We're Telling It" (Pet. App. 1a-11a). The article contains descriptions of technical principles



relating to the production of thermonuclear weapons, including basic design concepts and specific design features of United States thermonuclear weapons. The article also contains schematic depictions of such weapons. After considering numerous affidavits and hearing one witness, the district court found (Pet. App. 10a) that the basic principles disclosed by the article had not appeared authoritatively in public journals or been officially confirmed, and it held that these concepts are properly classified as "Secret Restricted Data" under the Atomic Energy Act of 1954, 42 U.S.C. 2014(y). The district court further found that the article "contains concepts that are not found in the public realm," and that publication of the secret restricted data in the article "would provide vital information on key concepts involved in the construction of a practical thermonuclear weapon" (Pet. App. 10a).

The four defendants filed a joint notice of appeal from the March 26, 1979, preliminary injunction. Although aware that the last date for hearings before the Seventh Circuit's summer recess was June 18, 1979,[1] the appellants filed a joint motion for expedition (App. C, *infra*, 11a), which proposed that appellants file their brief on May 14, 1979 (49 days after entry of the preliminary injunction), that the United States file its brief 30 days later, and that

[1] The Seventh Circuit's Senior Staff Law Clerk, who discussed the procedures for expedition with petitioners' counsel, has advised us that he informed petitioners' counsel of the court's calendar.

petitioners file their reply brief after 10 additional days. The motion then proposed (*ibid.*) that oral argument be scheduled "no earlier than June 28, 1979" in order to give government counsel time to consider appellants' reply brief.[2]

On May 16, 1979, the court of appeals issued an order en banc (App. A, *infra*) which denied the motion for expedition but set oral argument for the week of September 10, 1979, the first week after the summer recess. Petitioners did not seek reconsideration or review of that order.

After a docketing conference held on May 24, 1979, to consider pending motions, a three-judge panel set a briefing schedule giving petitioners until June 15, 1979, within which to file their briefs, and giving the United States until July 15, 1979, to file its response (App. B, *infra*, 7a). This schedule used the 30 days for briefing by the United States that petitioners themselves proposed, and it gave additional time to petitioners. Oral argument was set for September 10, 1979 (*ibid.*). The court of appeals' order following the docketing conference also encouraged petitioners to proceed expeditiously in the district court on their motion to reconsider and vacate the preliminary injunction so that the appeal, if any, from the district court's ruling on that motion also could be heard on September 10, 1079 (App. B, *infra*, 5a-6a).

[2] The motion bore the names of all the firms or organizations now representing petitioners, with the exception of White & Case, which was more recently retained as additional counsel for petitioner Morland.



Petitioners did not seek reconsideration or review of that order. Pursuant to this briefing schedule, petitioners filed their principal appellate briefs on June 15, 1979, 81 days after entry of the preliminary injunction.

The district court then set an expedited briefing schedule on petitioners' motion to vacate the injunction. On June 15, 1979, after considering hundreds of pages of materials and detailed affidavits, the district court denied the motion and issued an *in camera* opinion (Pet. App. 12a). The court considered the effect of each of the articles published or discovered by defendants after entry of the preliminary injunction, as well as the two government reports that had been mistakenly treated as declassified and placed in the public section of the Los Alamos Scientific Laboratory for limited periods (Pet. App. 13a-16a). The district court found that whether the information in dispute in this case has been disclosed through the mistaken exposure of the documents is conjectural, and that such an exposure of secret restricted data should not bar the government from preventing further release, if that release would jeopardize national security. Although the court recognized that one or more of the pieces of information in dispute had been the subject of mention or speculation in public, it concluded that there is an important difference between describing key concepts of the design of thermonuclear weapons with specificity (which the article does) and merely mentioning numerous concepts that may or may not be important and relevant. The Mor-

land article is unlike anything now available, the court found, because it alone provides an accurate, detailed and comprehensive description and analysis of hydrogen weapon construction (Pet. App. 18a).

On June 15—81 days after the entry of the preliminary injunction, and the day they filed their principal appellate brief—all defendants filed a joint notice of appeal from the order denying the motion to vacate. Petitioners also filed a motion for an expedited briefing schedule and oral argument, but The Progressive did not join in the motion. Petitioners' motion proposed that the appeal from the denial of the motion to vacate be consolidated with their earlier appeal from the grant of the preliminary injunction. Petitioners offered to file their brief regarding the denial of their motion to vacate within seven days, and they requested that the United States be required to file its response to both appeals within 14 days of its receipt of petitioners' *principal* brief (*i.e.*, by June 29, which would be no more than seven days after receipt of petitioners' brief on their subsequent appeal). Finally, petitioners proposed that the consolidated appeals be heard on the earliest possible date thereafter.

On June 21, 1979, Judge Sprecher granted the motion to expedite in part, but rejected petitioners' proposed briefing and argument schedule (Pet. App. 20a-21a). He consolidated the appeals, set them for argument on September 10, 1979, and set a briefing schedule consistent with that argument date (*ibid.*). Rather than seek reconsideration of Judge Sprecher's



order in the court of appeals, petitioners filed the instant mandamus petition.

## ARGUMENT

The management of its docket is a matter committed to the court of appeals' discretion. The extraordinary writ of mandamus should not be used to compel the court of appeals to alter the schedule it has established for briefing and argument of petitioners' consolidated appeals, especially since petitioners themselves proposed a deliberate schedule for briefing, and made use of all of the time allotted to them—81 days—to prepare their principal brief. Only then did petitioners seek to collapse the remainder of the briefing schedule, giving the United States a maximum of 14 days to prepare its response.[3]

The schedule established by the court of appeals is entirely appropriate in the circumstances of this case. It provides the government with an adequate period to prepare its response to petitioners' briefs, and it allows the court sufficient time to review the complex and voluminous record. Although petitioners contend that the district court's denial of their motion to vacate placed matters in a new light requiring greater expedition, this Court should not override the court

[3] Because petitioners proposed that the United States' 14 days run from June 15, 1979, when they filed their opening brief on the appeal from the entry of the preliminary injunction, the United States' brief would have been due on June 29. That would have been no more than seven days after petitioners filed their brief on appeal from the denial of the motion to vacate.

of appeals' decision to proceed with the previously established schedule, especially in view of the fact that petitioners failed even to seek reconsideration of this single-judge order by a panel of the court of appeals.

A writ of mandamus issued by this Court is a "drastic and extraordinary" remedy. *Ex parte Fahey*, 332 U.S. 258, 259, 260 (1947). Mandamus may be issued to " 'confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 661 (1978) (plurality opinion), quoting *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26 (1943). A writ of mandamus also may issue to review a "clear abuse of discretion" that amounts to a usurpation of judicial power. *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 257 (1957). But see *Will* v. *Calvert Fire Insurance Co.*, *supra*, 437 U.S. at 665 n.7 (plurality opinion). The party seeking to obtain a writ of mandamus has a substantial burden; he must show that his " 'right to the issuance of the writ is "clear and indisputable." ' " *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). Petitioners have not made the necessary showing.

The lower courts have substantial latitude in scheduling the cases on their dockets. See *Will* v. *Calvert Fire Insurance Co.*, *supra*, 437 U.S. at 665. The court of appeals did not abuse this discretion in denying petitioners' most recent motion for expedition, and the court certainly did not usurp power or exceed its



jurisdiction. We agree with petitioners that an appellate court should expedite review of any order imposing a prior restraint on speech. But the time necessary for briefing and argument nevertheless varies according to the nature and complexity of the case, and accordingly the reviewing court has discretion to establish a reasonable schedule for review in the circumstances of the particular case. Cf. *Nebraska Press Association* v. *Stuart*, 423 U.S. 1327, 1329-1330 (1975) (Blackmun, Circuit Justice). The facts here demonstrate that the Seventh Circuit acted responsibly. Even if it erred (which we doubt), correction of mere error is not the office of mandamus.

Petitioners compare the instant case to *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). In that case the appellants sought immediate review in the appropriate appellate court within hours of each decision, and they filed their briefs and the supporting materials almost as quickly.[4] Here, in contrast, petitioners and the other defendant, The Progressive, made a calculated tactical choice to proceed more deliberately in order to allow themselves adequate time for briefing the complex factual and legal issues involved. For that reason petitioners initially proposed a briefing schedule that afforded them at least 49 days after the entry of the preliminary injunction to prepare their primary brief and

[4] The courts of appeals expedited the cases without prompting by this Court. These decisions thus offer little support for petitioners' assumption that mandamus would have issued to compel greater expedition.

afforded the government at least 30 days to file its response. Petitioners proposed this schedule even though they knew that the earliest argument date they had proposed fell during the court of appeals' summer recess. Petitioners raised no immediate objection to the briefing and argument schedule established by the court, and they took almost three months to draft their principal appellate brief.

The time afforded by the schedule established by the court of appeals was needed because the case involves novel legal issues inextricably bound up with complex technical concepts relating to the production of thermonuclear weapons. The record contains a large number of detailed technical affidavits comparing the concepts contained in the public literature with those in the article subject to the injunction.

Given this background, the court of appeals was entitled to reject a suggestion—made only after petitioners had taken 81 days to file their brief—that the time available to the government and court be compressed drastically. The task of comparing the excerpts petitioners have cited from various technical publications with the information that the government is seeking to protect is a difficult and time consuming one, for the parties as advocates and for the reviewing courts. And in view of the grave consequences that would flow from an erroneous decision resulting in the publication of the hitherto secret core concepts of the hydrogen bomb, the case necessarily calls for careful unhurried study. As the district court pointed out (Pet. App. 10a), the Morland article provides a



"comprehensive, accurate, and detailed analysis of the overall construction and operation of a thermonuclear weapon," and publication of the information in the article "would be extremely important to a nation seeking a thermonuclear capability, for it would provide vital information on key concepts involved in the construction of a practical weapon." The information has been secret since its discovery in the early 1950s. Surely society loses little by devoting to this case the few months that are necessary for full and studied consideration. The costs of waiting are slight; the potential costs of any error introduced by unwarranted haste are enormous.

Petitioners contend that circumstances changed significantly when the district court denied their motion to vacate the injunction, and that the schedule previously adopted by the court of appeals was no longer appropriate. But the denial of the motion to vacate did not narrow the issues on appeal. To the contrary, the affidavits received by the district court made the case more difficult and complex. The issues identified in petitioners' principal appellate brief—the proper standard for the issuance of an injunction against publication, the adequacy of the government's affidavits, the standards for demonstrating a violation of the Atomic Energy Act of 1954, 42 U.S.C. 2274(b), the constitutionality of the Act, and whether the material in the Morland article is in the public domain—all are relevant to the court's refusal to vacate the preliminary injunction. Petitioners now seek to avoid the consequences of their acquiescence in the briefing and argument schedule for their original appeal by

viewing their appeal from the denial of the motion to vacate in isolation. But petitioners' new focus should not obscure petitioners' failure to object to the schedule when it was first established by the court of appeals, and it does not explain their failure to ask the court as a whole to review Judge Sprecher's order consolidating the two appeals and adhering to the original briefing schedule. If, as petitioners say, there has been a dramatic change in this case, the Seventh Circuit should be given the opportunity to review the action of its judge, and, if necessary, change his decision. It would be particularly inappropriate for this Court to issue the extraordinary writ of mandamus where petitioners did not even pursue their remedies in the court of appeals.[5]

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[5] The number of avenues not pursued is substantial. Fed. R. App. P. 27(c) allows a panel of the court to review a single-judge order. Petitioners also could have asked the court of appeals to stay the injunction and thus obtained an expedited (if abbreviated) form of review; they did not, however, seek a stay in either the court of appeals or this Court. Petitioners could have expedited the case by seeking certiorari before judgment under 28 U.S.C. 1254(1), but they elected not to do so. And petitioners could have treated the denial of the motion to expedite as a "final decision" to allow the restraint to continue, thus permitting review by certiorari under the approach of *National Socialist Party* v. *Village of Skokie*, 432 U.S. 43 (1977); they did not use this avenue either. We do not urge petitioners to do any of these things. This is a complex case, and the more time that is spent on motions the less will be available to attend to the merits. We raise these options only to suggest that mandamus to review a single-judge's order—the avenue petitioners chose—is in our view the least appropriate of all.



## CONCLUSION

The motion for leave to file a petition for a writ of mandamus should be denied.

Respectfully submitted.

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JUNE 25, 1979

**APPENDIX A**

CORRECTED

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

CORRECTED ON MAY 18, 1979

May 16, 1979

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

Appeal from the United States District Court
for the Western District of Wisconsin

Civ. No. 79-C-98

Judge Robert W. Warren

No. 79-1428

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

*vs.*

THE PROGRESSIVE, INC., ET AL.,
DEFENDANTS-APPELLANTS.

ORDER

The defendants-appellants' motion for a hearing *en banc* is DENIED.

While the motion for expedited hearing is also DENIED, oral argument will be heard during the week of September 10, 1979.

Chief Judge Fairchild has disqualified himself from participation in this case.



**APPENDIX B**

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 5, 1979

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

Appeal from the United States District Court
for the Western District of Wisconsin

No. 79-C-98

Robert W. Warren, Judge

No. 78-1428

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

*vs.*

THE PROGRESSIVE, INC., ERWIN KNOLL,
SAMUEL DAY, JR., and HOWARD MORLAND,
DEFENDANTS-APPELLANTS.

This matter comes before the court for its consideration on the filing herein of the following documents:

1. The "MOTION TO TAKE JUDICIAL NOTICE OF ADJUDICATIVE FACTS OR TO REMAND TO

DISTRICT COURT TO CONSIDER NEW EVIDENCE" filed herein on May 7, 1979 by counsel for the defendants-appellants.

2. The "*IN CAMERA* MEMORANDUM IN SUPPORT OF MOTION TO TAKE JUDICIAL NOTICE OF ADJUDICATIVE FACTS OR TO REMAND TO DISTRICT COURT TO CONSIDER NEW EVIDENCE" filed herein on May 7, 1979 by counsel for the defendants-appellants.

3. The "*IN CAMERA* AFFIDAVIT OF EARL MUNSON, JR. IN SUPPORT OF MOTION TO RETAIN JURISDICTION BUT REMAND THE RECORD TO THE UNITED STATES DISTRICT COURT FOR LIMITED HEARING AND, IN THE ALTERNATIVE, FOR JUDICIAL NOTICE" filed herein on May 7, 1979 by counsel for the defendants-appellants.

4. The "SUPPLEMENTAL SUBMISSION OF AFFIDAVIT IN SUPPORT OF MOTION TO TAKE JUDICIAL NOTICE OR LIMITED REMAND" filed herein on May 11, 1979 by counsel for the defendants-appellants.

5. The "OPPOSITION TO MOTION TO TAKE JUDICIAL NOTICE OF ADJUDICATIVE FACTS OR TO REMAND TO DISTRICT COURT TO CONSIDER NEW EVIDENCE" filed herein on May 14, 1979 by counsel for the plaintiff-appellee.

6. The "APPELLEE'S MOTION TO PROVIDE SECURITY FOR BRIEFS AND OTHER DOCUMENTS PREPARED FOR THIS APPEAL" filed herein on May 1, 1979 by counsel for the plaintiff-appellee.



7. The "APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO PROVIDE SECURITY FOR BRIEFS AND OTHER DOCUMENTS PREPARED FOR THIS APPEAL" filed herein on May 9, 1979 by counsel for defendants-appellants.

8. The "MOTION TO MODIFY PROTECTIVE ORDER" filed herein on May 9, 1979 by counsel for the defendants-appellants.

9. The "AFFIDAVIT IN SUPPORT OF MOTION FOR CUSTODY OR USE OF PLAINTIFF'S *IN CAMERA* MATERIALS" filed herein on May 9, 1979 by counsel for the defendants-appellants.

10. The "UNITED STATES' OPPOSITION TO APPELLANTS' MOTION TO MODIFY PROTECTIVE ORDER" filed herein on May 18, 1979 by counsel for the plaintiff-appellee.

This court has considered the above documents and has met in conference with attorneys for the parties to this appeal. On consideration whereof,

IT IS ORDERED that the motion to take judicial notice or for limited remand to the district court is hereby HELD IN ABEYANCE pending further order of this Court. The parties are encouraged to apply, expeditiously, to the district court for appropriate relief, if any, under the procedures approved by this Court in *Washington* v. *Board of Education*,

498 F.2d 11, 15-16 (7th Cir. 1974), and *Binks Manufacturing Co.* v. *Ransburg Electro-Coating Corp.*, 281 F.2d 252, 260-61 (7th Cir. 1960), *cert. dismissed*, 366 U.S. 211 (1961).

IT IS FURTHER ORDERED that the protective order entered by the district court in this case is hereby MODIFIED in accord with the agreement on procedures which has been reached by the parties. The agreement as to the protective order, which is approved by this Court, is attached hereto as Exhibit A.

IT IS ALSO FURTHER ORDERED that security for briefs and documents filed in this appeal shall be provided under the terms of the following order:

1. On March 14, 1979, the district court issued a protective order which prohibits the disclosure of Secret Restricted Data pursuant to the Atomic Energy Act of 1954, 42 U.S.C. § 2014, or other classified information except under specified limitations and conditions. The district court's protective order, as modified by this Court, remains fully effective. This order implements the district court's protective order in the context of the procedures of this Court.

2. To implement that order, the required number of copies of the appellants' brief and reply brief shall be initially filed with the Clerk of Court *in camera*. Within five (5) days (three (3) days for the reply brief) of receipt of the copies of such briefs, the United States shall advise appellants as to those portions of the brief, if any, it requires to remain *in*



*camera*. If appellants object to the continued *in camera* status of material designated by the United States, and the parties fail to resolve any differences, the matter shall be resolved by the court at the earliest convenient opportunity. Thereafter, appellant shall file publicly an additional set of briefs with the Clerk of the Court which do not contain *in camera* materials as designated by the United States, unless otherwise allowed by this Court.

3. Any other documents, *e.g.*, appendices, motions, etc., which disclose information submitted *in camera* in the district court shall be subject to the procedures of paragraph 2 applicable to appellants' main brief.

IT IS ALSO FURTHER ORDERED that the following revised briefing schedule is hereby ADOPTED:

1. The defendants-appellants shall file their brief on or before June 15, 1979.

2. The plaintiff-appellee shall file its brief on or before July 15, 1979.

3. The defendants-appellants shall file their reply brief, if any, on or before August 1, 1979.

4. Oral argument in this matter will be heard on September 10, 1979 at 2:00 p.m.

EXHIBIT "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 79-1428

[U.S.C.A.—7th Circuit—Filed May 30, 1979—
Thomas F. Strubbe]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

*v.*

THE PROGRESSIVE, INC., ERWIN KNOLL,
SAMUEL DAY, JR., and HOWARD MORLAND,
DEFENDANTS-APPELLANTS.

STIPULATION

On March 14, 1979, the district court entered a protective order in this case. Plaintiff wishes to re-emphasize the very sensitive nature of the *in camera* material filed by the United States, and protected by the district court's protective order. However, because of the concerns expressed by this Court, plaintiff is willing to stipulate that for purposes of the proceedings in this Court the protective order is modified as follows:

1. That defendants are allowed to remove any notes they may take on the *in camera* materials filed by the United States from the U.S. Attorney's office, but such *in camera* materials themselves shall remain in the U.S. Attorney's office. The defendants will re-



tain these notes in a secure manner and store them in a safe provided and approved by the Department of Energy. Persons having access to the safe must be cleared by the United States, and only those individuals may have access to the notes.

2. The notes shall be subject to the district court's protective order, and the defendants cannot make copies of those notes.

3. At the time defendants' principal brief is filed, their notes shall be returned to the safe in the U.S. Attorney's office. At the time plaintiff files its brief, the defendants may again remove those notes from the U.S. Attorney's office to the safe in their office under the conditions described in paragraph 1 above. After they file their reply brief, the defendants shall return their notes to the U.S. Attorney's office.

4. Except to the extent modified herein, the district court's protective order of March 14, 1979, as previously amended, shall remain fully in effect. This stipulation is without prejudice to defendants' right to seek further amendment of the protective order in the district court.

The defendants consent to the provisions set forth in paragraphs 1 through 4 above.

For the Defendants-Appellants

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/s/ Michael F. Hertz
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Washington, D.C. 20530



## APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Western District of Wisc.

Civil Action No. 79-C-98

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

*vs.*

THE PROGRESSIVE, INC., ERWIN KNOLL, SAMUEL DAY, JR., and HOWARD MORLAND, DEFENDANTS-APPELLANTS.

## MOTION FOR EXPEDITED APPEAL

Defendants jointly move this Court to expedite its consideration of this matter and to schedule oral argument as soon as the business of the Court will permit and subject to the following schedule agreed to between counsel for the plaintiff and counsel for the defendants:

Defendants' Brief to be delivered in hand to counsel for the Plaintiff on May 14, 1979;

Plaintiff's brief to be delivered in hand to counsel for Defendants on June 13, 1979;

Defendants' reply brief to be delivered in hand to counsel for the Plaintiff on June 23, 1979; and

Oral argument to be scheduled no earlier than June 28, 1979 in order to allow counsel for the Plaintiff an opportunity to consider the Defendants' reply brief.

The foregoing schedule is subject to modification should the business of the Court require that oral argument be scheduled subsequent to June 29, 1979.

In support of their motions, defendants state that:

1. This is an appeal from a preliminary injunction issued by the District Court for the Western District of Wisconsin on March 26, 1979 enjoining defendants from publishing an article in *The Progressive* magazine.

2. The statutory and constitutional issues resolved by the District Court in granting such preliminary injunction are fundamental, unique and of exceptional importance.

3. The preliminary injunction poses extreme hardship upon defendants, preventing them from publishing an article, speaking or writing about certain subjects in the article, depriving them of their First Amendment rights and discouraging the free exercise of those rights by others.

4. With the exception of the transcripts of three brief hearings, the record in the court below consists entirely of affidavits submitted by the parties.

5. Counsel for the plaintiff has no objection to the time schedule set forth above so long as the time limitations on their preparation of a brief and review of a reply brief are not more restricted than those stated above.



Dated this 20th day of April, 1979.

LA FOLLETTE, SINYKIN,
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By /s/ Earl Munson, Jr.
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## CERTIFICATE OF SERVICE

Earl Munson, Jr. certifies that on the 20th day of April, 1979, a true and correct copy of Defendants Suggestion for Hearing *in banc*, Motion for Expedited Appeal and Memorandum in Support of such Suggestion and Motion was served on counsel for Plaintiff by mailing a copy to:

Robert E. Kopp, Esq.
Deputy Director, Appellate Staff
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